3/12/14 - c.c. Rptr. Jud Dec., Reid + Riege, B. Farrell

Docket No. CV-11-6020571-S	:	SUPERIOR COURT
TICKETNETWORK, INC.	:	JUDICIAL DISTRICT OF HARTFORD AT HARTFORD
VS.	:	
DAVID FAY, ET AL	:	MARCH 11, 2014

MEMORANDUM OF DECISION ON MOTION FOR SUMMARY JUDGMENT

The plaintiff, TicketNetwork, Inc., commenced this defamation action against the defendants, David Fay and the Horace Bushnell Memorial Hall Corporation (the Bushnell), on April 7, 2011, and April 5, 2011, respectively, making the following factual allegations: Fay is the president and chief executive officer of the Bushnell. On February 24, 2011, Fay testified before the General Law Committee of the Connecticut General Assembly (the committee) on proposed legislation that would prevent venues such as the Bushnell from engaging in certain activities, including limiting the resale or transfer of tickets to events. During this testimony, Fay made several false comments concerning the business practices of the defendant and its chief executive officer, Donald Vaccaro. After making these comments before the committee, Fay made further false statements concerning the plaintiff in an interview with the Journal Inquirer newspaper. Fay knew all of these statements were false when he made them or made them with reckless disregard of their truth. The plaintiff asserts defamation claims against Fay and the Bushnell in counts one and two, respectively, and a claim that the defendants' actions violated the Connecticut Unfair Trade Practices Act (CUTPA) in count three.

On August 20, 2013, the defendants moved for summary judgment on the ground that the defendants have absolute immunity for the statements made during the legislative proceedings before the committee.

167

The court heard the motion at short calendar on October 28, 2013. On the same day, the court also ordered that the plaintiff would have until November 1, 2013, to respond to the defendant's reply and that the defendant would have a week after that to respond. On November 1, 2013, the plaintiff filed a surreply in further opposition to the motion for summary judgment. On November 20, 2013, the defendants submitted a supplemental memorandum of law in support of their motion. On December 10, 2013, the plaintiff filed a reply to the defendants' supplemental memorandum.

-I-

The defendants move for summary judgment on the grounds that Fay's statements to the committee were absolutely privileged. Because his statements to the committee were privileged and evidence demonstrates that Jacovino did not quote Fay in the article at issue, the defendants argue that the newspaper article cannot be the basis for a defamation claim.

Noting that there is no dispute that Fay made comments to Jacovino, the plaintiff argues that summary judgment cannot be granted because genuine issues of material fact remain as to what precisely Fay said to Jacovino during this separate conversation.

In their reply, the defendants argue that the only statements at issue are those that Fay made to the committee. The defendants note that the only statements that the plaintiff alleges were made to Jacovino were those statements that were reported in the Journal Inquirer and that these statements were the result of Jacovino's paraphrase and attribution of Fay's testimony, not any separate statements made to Jacovino. Further, the defendants

argue that no conversation between Fay and Jacovino occurred prior to the article's publication.

Both parties have also made extensive arguments as to other points of law raised in this motion for summary judgment. These issues include: whether the committee proceeding was a quasi-judicial proceeding to which an absolute privilege would attach; whether and to what degree a witness in a legislative proceeding is absolutely privileged for any statements made; and whether an absolute privilege bars recovery for a CUTPA claim. Because the present motion can be resolved on the issue of whether a privilege extends to statements made to the Journal Inquirer, however, these points of law are not necessary to be decided.

-II-

Addressing whether a privilege would protect statements made to a legislative body, the appellate courts of this state have stated that an absolute privilege protects statements made in legislative proceedings; see *Hassett* v. *Carroll*, 85 Conn. 23, 35, 81 A. 1013 (1911); *Lega Siciliana Social Club, Inc.* v. *St. Germaine*, 77 Conn. App. 846, 855 n.4, 825 A.2d 827, cert. denied, 267 Conn. 901, 838 A.2d 210 (2003); but have never fully addressed whether or under what conditions that privilege attaches to the statements made by witnesses before legislative bodies. In the only Connecticut case where the issue was before the court, the Appellate Court noted that the privilege protected state and federal legislators but did not address whether the privilege extended beyond these categories. See *Lega Siciliana Social Club, Inc.* v. *St. Germaine*, supra, 77 Conn. App. 855 n.4.

Assuming, arguendo, that the statements of the defendants before the committee were privileged because they were spoken in either a quasi-judicial or legislative proceeding and were relevant to those proceedings, the question remains as to whether the statements to the Journal Inquirer are not similarly privileged. "In determining whether an occasion is absolutely privileged, the pivotal factor is frequently to whom the matter is published. . . . The privilege may be lost by unnecessary or unreasonable publication to one for whom the occasion is not privileged." "Publication to the media of material that the media was independently entitled to view, however, cannot provide a basis for a claim of defamation." Id. In *Kelley* v. *Bonney*, the Supreme Court noted that the critical issue was "whether, regardless of the actions of the defendant, the media would have been entitled to access" the allegedly defamatory information. Id., 576-77. Noting the lack of a compelling argument to punish the publication of documents to a local newspaper that the newspaper could have independently viewed and that, pursuant to the provisions of the state's Freedom of Information Act, the newspaper had a statutory right to the specific information provided, the court held that the publication to the newspaper did not defeat the defendant's absolute privilege. Id., 577-79.

In *Biro* v. *Hirsch*, Superior Court, judicial district of Fairfield, Docket No. CV-0314442-S (February 5, 1998, *Skolnick, J.*) Id., the court examined the allegations at hand, the court noted that, although privileged statements that the media was independently entitled to view cannot serve as the basis for a defamation claim, the statements in that case were allegedly "broader than those made in the pleadings filed with the court" and denied the motion to strike.

In the present case, Fay affirms in his affidavit that he testified before the committee to present factual information concerning proposed legislation that would set limits on the ability of entertainment venues such as the Bushnell to control aspects of their ticket sales. The committee was seeking public comment before it voted on the bill, and Fay, acting in his role as president and chief executive officer of the Bushnell, testified as to his personal and professional thoughts on the proposed legislation. Fay testifies that his statements were about the entire secondary ticket brokerage industry as opposed to the plaintiff's practices as a single company and were partly response to Vaccaro's testimony the day before on the same legislation. Sometime after his testimony, Fay was contacted by a reporter from the Journal Inquirer who was composing an article on the bill and the public debate about its merits. Fay testifies that he did not give the reporter any quotes for this article but rather recounted his testimony before the committee.

The article that Fay in his affidavit attests is a true and accurate copy of the Journal Inquirer article for which he was interviewed is titled "TicketNetwork denies undercutting venues' box offices," dated April 5, 2011, and was written by Jacovino. Although none of the allegedly defamatory statements appear in the portion of the article submitted, the copy of the article is incomplete.

Jacovino states in his May 2, 2013 deposition that he did reporting on the proposed legislation in 2011. As part of these duties, he wrote a story entitled "Ticket-marketing bill portrayed as boon to scalpers" for the Journal Inquirer, which was published on March 18, 2011. Jacovino testified that, to the best of his recollection, he

relied solely on Fay's oral and written testimony that was submitted to the committee and which he accessed from the General Assembly's website. Jacovino also stated that he did not believe he had any contact with Fay prior to the story being published. Upon review of his records, however, Jacovino admitted that he had spoken with Fay in between the publication of the article and March 23, 2011. Though not recalling the conversation precisely, Jacovino surmised that he might have called to confirm that the statements in Fay's testimony were accurate.

In his December 10, 2012 deposition, Fay stated that he had spoken with Jacovino sometime after his testimony to the committee but before the article was published on March 18, 2011. Fay recalled that Jacovino had questions concerning Fay's comments to the committee; these questions included whether Fay had testified, some clarifications about what Fay had said, and general questions about the secondary ticket market. Fay states that Jacovino did not ask any specific questions about the plaintiff, but rather asked about the general ticket market. Fay also notes, however, that Jacovino used the word "TicketNetwork" in the course of the conversation, though he claims that Jacovino used it in the context of referencing Vaccaro's testimony before the committee. Fay also denied ever making several of the representations alleged within the Journal Inquirer article and in the plaintiff's complaint.

Examining the evidence, there is not a genuine issue of material fact that Jacovino relied at least in part on the written and oral testimony submitted by Fay to the General Assembly as accessed from the General Assembly's website. Thus, to the extent that Jacovino was apparently independently entitled to access this testimony, any privilege

that would have attached to the testified statements would have covered the transmission of those same comments to Jacovino.

Nevertheless, there are several genuine issues of material fact that remain. First, it is in dispute whether Jacovino and Fay spoke prior or subsequent to the publication of the article containing the allegedly defamatory statements. Second, Fay's statements concerning the extent of the conversation, when taken in the light most favorable to the plaintiff, suggests that the conversation might have extended beyond a simple recounting or affirmation of the potentially privileged testimony and involved discussion of the plaintiff's business. Thus, even though various portions of both Jacovino's and Fay's testimony suggest that Jacovino relied either primarily or solely on publicly available transcripts of Fay's testimony to the committee in writing the article and that any follow-up conversation only involved verification that Fay had in fact made those statements, other evidence raises genuine issues of material fact concerning whether nonprotected defamatory statements were made and the degree to which they were relied upon in Jacovino's article.

Since all three counts are at least in part based on allegations for which a genuine issue of material fact exists, this court does not have to address whether an absolute privilege shields Fay's statements to the legislature. In Connecticut, there is no appellate authority as to whether a court can permit summary judgment against a party relative to individual allegations within a single count of a complaint. At the trial court level there is a split of authority on the issue. A review of the decisions finds that the majority of the cases do not allow a party to eliminate some, but not all, of the allegations of a single

count through a motion for summary judgment. *Glidepath, LLC* v. *Lawrence Brunoli, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-10-6014624-S (December 21, 2012, *Peck, J.*).

The motion for summary judgment is denied.

Wagner, JTR

CHECKLIST FOR CLERK

Docket Number CV11-6020571

Case Name Ticketwood v. Fay

Memorandum of Decision dated 3/11/14

File Sealed: yes_____ no✓_____

Memo Sealed: yes _____ no✓_____

This Memorandum of Decision may be released to the Reporter of Judicial Decisions for publication. ✓_____

This Memorandum of Decision may **NOT** be released to the Reporter of Judicial Decisions for publication. _____

State of Connecticut
Judicial Branch

HHD-CV11-6020571-S TICKETNETWORK, INC. v. FAY, DAVID Et Al

Prefix: WAG **Case Type:** T50 **File Date:** 04/08/2011 **Return Date:** 05/03/2011

Information Updated as of: 03/12/2014

Case Information

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List Type: JURY (JY)
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Disposition Information

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Disposition:
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Party & Appearance Information

Party			No Fee Party
P-01	**TICKETNETWORK INC.** **Attorney:** REID & RIEGE PC (049362) ONE FINANCIAL PLAZA HARTFORD, CT 06103	File Date: 04/08/2011	
D-50	**DAVID FAY** **Attorney:** FARRELL BRIAN J JR. LAW OFFICES (423111) 555 LONG WHARF DRIVE NEW HAVEN, CT 06511	File Date: 05/04/2011	
D-51	**THE HORACE BUSHNELL MEMORIAL HALL CORPORATION** **Attorney:** FARRELL BRIAN J JR. LAW OFFICES (423111) 555 LONG WHARF DRIVE NEW HAVEN, CT 06511	File Date: 05/04/2011	

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Motions / Pleadings / Documents / Case Status

Entry No	File Date	Filed By	Description	Arguable
	04/08/2011	P	SUMMONS	
	04/08/2011	P	COMPLAINT	
	04/08/2011	P	RETURN OF SERVICE	
	05/04/2011	D	APPEARANCE Appearance	
101.00	05/19/2011	D	MOTION FOR EXTENSION OF TIME RE DISCOVERY MOTION OR REQUEST PB CH13 *RESULT:* Granted 6/7/2011 HON RICHARD RITTENBAND	No